United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL 74-2457

United States Court of Appeals

For the Second Circuit.

SAMUEL H. SLOAN,

Petitioner-Appellant,

-against-

SECURITIES & EXCHANGE COMMISSION,

Respondent-Appellee.

On Appeal From The United States District Court For The Southern District Of New York

Appellant's Brief

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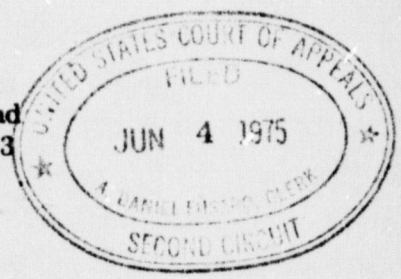

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL H. SLOAN

Petitioner

-against-

SECURITIES & EXCHANGE COMMISSION

Respondent

BRIEF OF THE PETITIONER

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the United States Court of Appeals have jurisdiction as to this controversy?

2. Did the Securities & Exchange Commission abuse its discretion in ordering that trading in Canadian Javelin Ltd. be suspended?

3. Are Sections 15(c)5 and 19(a)4 of the Securities Exchange Act of 1934 (15 U.S.C. 780(c)5 and 15 U.S.C. 78s(a)4), in which the Securities & Exchange Commission is authorized summarily to suspend trading in any security, unconstitutional?

4. Are the orders of suspension of trading a legal nullity because they are unsigned by the Securities & Exchange Commission or by any of the commissioners?

5. Is the proceeding before this court, which is

authorized by Section 25 of the Securities Exchange Act of 1934 (15 U.S.C. 78y), repugnant to the constitution in that does not permit judicial review of orders of the Securities & Exchange Commission and does not provide for notice and the opportunity for a hearing in a court of law?

6. Is the existance of an independent regulatory body such as the Securities & Exchange Commission, which is not part of the executive, legislative or judicial branches of the United States government, repugnant to the Constitution?

7. Is this controversy moot?

8. Is the petitioner entitled to an award of costs on the grounds that Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. 78aa), which provides that no costs may be awarded against the Securities & Exchange Commission is unconstitutional in that it deprives the petitioner of the equal protection of the law and of property without due process of law?

9. Is Section 33 of the Securities Exchange Act of 1934 (15 U.S.C. 78gg) and the Securities Exchange Act in its entirety unconstitutional?

STATEMENT OF THE CASE

On November 29, 1973, the respondent, Securities & Exchange Commission ("S.E.C."), filed a complaint in the United States District Court for the Southern District of New York in an action entitled *S.E.C. v. Canadian Javelin Ltd. et al* 73 Civil 5074. (CCH Fed. Sec. Law Rep. ¶94,226 (1973 transfer binder)). Contemporaneously, the S.E.C. suspended all trading in the shares of Canadian Javelin Ltd. ("CJV") both over-the-counter and on the American Stock Exchange (A5). At the time of the suspension of trading, CJV was listed on the American, Montreal and Vancouver Stock Exchanges (A8). In addition, on November 29, 1973, the S.E.C. issued a press release,

Exchange Act Release No. 10534, which stated that "trading in the securities of Javelin was suspended in order to allow dissemination of the allegations in the Commissions complaint."[1]

Following this initial suspension of trading, the S.E.C. continued to order successive ten day suspensions of trading in CJV. On January 10, 1975, more than one year later, the S.E.C. ordered that the suspension of trading in CJV would finally terminate on January 12, 1975 (Exchange Act Release No. 11172 issued January 10, 1975). However, on the morning of January 13, 1975, the suspension of trading was extended for another ten days at the request of CJV and the American Stock Exchange. (Wall Street Journal, Tuesday, January 14, 1975, p. 25). On January 27, 1975, trading in CJV was finally permitted to resume.

However, on April 30, 1975 the S.E.C. once again suspended trading in CJV and has since continued to order successive ten day suspensions. These suspensions are in effect as of the writing of this brief.

In July, 1974, the S.E.C. settled its suit against CJV by the entry of two consent orders of permanent injunction and by a stipulation of discontinuance. (CCH Fed. Sec. Law Rep. ¶94,720 (1974 binder)). However, the petitioner herein, Samuel H. Sloan ("Sloan"), moved to intervene, to vacate the injunctions, and for an order permitting trading in CJV to resume. The S.E.C. opposed this motion with the argument that the United States Court of Appeals had exclusive jurisdiction to review orders of suspension of trading. Judge MacMahon, in denying this motion, stated that he doubted that the court had the power, in this case,

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1. That release and other Exchange Act, releases which announce or deal with trading suspensions are not part of the record before this court, but, nevertheless, can be found in the Federal Register.

to order that trading be resumed. (CCH Fed. Sec. Law Rep. ¶94,861 (1974 binder)). Sloan then filed a notice of appeal with respect to Judge MacMahon's decision and filed a petition for review of various orders of suspension of trading. It is this petition for review with which this proceeding is now concerned.

SUMMARY OF ARGUMENT

The sections of the Securities Exchange Act of 1934 ("Exchange Act") in which the S.E.C. is authorized summarily to suspend trading in any security are unconstitutional in that they provide for a deprivation of liberty and property without due process of law. In addition, the power of the United States Government is limited by the commerce clause of the United States Constitution and does not extend to the ability to prohibit the purchase and sale of a particular security. Furthermore, the existance of an independent regulatory body, which is not part of the legislative, executive, or judicial branches of the government and which has broad regulatory powers such as the power to suspend trading in a security, is repugnant to the constitution.

This proceeding, which is authorized by Section 25 of the Exchange Act, fails to provide for rights guaranteed by the constitution because this court cannot provide judicial review of orders of the S.E.C. since it is ill equipped to perform finding functions. This court cannot order a trial or a hearing on the merits and, in this case, there was neither notice nor the opportunity for a hearing before the S.E.C. Since orders of the S.E.C. cannot be subject to judicial review, those sections of the Exchange Act which permit the S.E.C. to make orders subject to review by the United States Court of Appeals are unconstitutional.

This controversy is not moot. Although the initial order of suspension has expired, the S.E.C. has continued to

orde. successive ten day suspensions of trading. One such order providing for the suspension of trading is now in effect. Even if the suspension had terminated, or if it does terminate by the time this court makes its decision, this controversy is still not moot because these orders, by their nature, are of no more than ten days in duration and therefore the wrong doing which has been perpetrated by the S.E.C. in suspending the trading in this and other securities in "capable of repetition, yet evading review."

The S.E.C. abused its discretion in suspending trading in CJV. The memorandums, upon which the suspensions in question purport to be based are, to the extent that they can be read, unsigned. One can only presume that they were prepared by someone employed by the S.E.C. They appear to be based on the rankest kind of heresay. The orders of suspension are themselves unsigned by any of the commissioners of the S.E.C. Therefore, these orders are a legal nullity. Furthermore, the S.E.C. has violated the Exchange Act by continuing the suspension of trading in CJV beyond ten days. Section 15(c) 5 provides that trading may be suspended for a period not exceeding ten days and Section 19(a) 4 contains similar language with the added provision that trading may be suspended for a period not exceeding ninety days with the approval of the President. In this case, trading has been suspended for more than a year. In addition, it is never in the public interest that trading be suspended in a security.

The petitioner is entitled to the recovery of costs on this appeal. Although the award of costs against the S.E.C. is prohibited by Section 27 of the Exchange Act (15 U.S.C. 78aa), this section is unconstitutional in that it deprives the petitioner of the equal protection of the law and it deprives him of property without due process of law.

Since various key sections of the Exchange Act are unconstitutional, the entire act is unconstitutional including Section 33 of the act which, in effect, prohibits the courts from declaring the act to be unconstitutional.

ARGUMENT

POINT I

THIS CONTROVERSY IS NOT MOOT

In papers filed in this court in February, 1975, the S.E.C. has already suggested that this proceeding be dismissed as moot. However, intervening circumstances have demonstrated that this controversy is not moot. In particular, the S.E.C. suggested that this proceeding be dismissed as moot shortly after January 27, 1975, on which date the S.E.C. permitted the shares of CJV to resume trading. However, on April 30, 1975, the S.E.C. again suspended trading in CJV and that suspension continues until the present.

A controversy is not moot whenever it is "capable of repetition, yet evading review." *Southern Pacific Terminal Company v. ICC* 219 U.S. 498, 515 (1911), *Roe v. Wade* 410 U.S. 113, 125 (1973). This is the case here. Every order of suspension of trading has a duration of no more than ten days although it might be arguably stated that when the S.E.C. "continues" a suspension of trading it merely extends on existing order. Under Rule 17(a) F.R. App. P., the S.E.C. is not required to file the record until 40 days after the petition for review has been filed and served. Thus, the record would not normally be filed with this court until after a particular order of suspension of trading has expired. However, even if the court were to order the filing of the record, the filing of briefs and oral argument on an expedited basis, it is unlikely that all of the preliminary work could be completed, the case argued, and the petition decided on the merits before the ten day period were to expire. Furthermore, even if all of this could be completed within ten days and assuming the petitioner prevailed, the S.E.C. could immediately order a new

suspension of trading and start the process all over again. Thus, if this controversy is moot, there could never be effective review by this Court.

In this case, there has not been a voluntary cessation of the alleged illegal conduct and even if there were, it would not make this controversy moot. *United States v. W.T. Grant Co.* 345 U.S. 629, 632 (1953); *United States v. Trans-Missoun Freight Assn.* 166 U.S. 290, 308-310 (1897); *Walling v. Helmerich & Payne, Inc.* 323 U.S. 37, 43 (1944); *Gray v. Sanders.* 372 U.S. 368, 376 (1963); *United States v. Phosphate Export Assn.*, 393 U.S. 199, 202-203 (1968). In this case, the S.E.C. has continued to suspend trading in CJV and, in addition, has suspended trading in numerous other securities. On April 11, 1974, the S.E.C. simultaneously suspended trading in 48 different securities for failure to file 10-K reports with the S.E.C. for the year ended 1972. (Exchange Act Release No. 10732). On November 20, 1974, the S.E.C. suspended trading in American Telephone & Telegraph Co. from 3:00 P.M. (EST) on November 20, 1974 until 10:00 A.M. (EST) on November 21, 1974. (Exchange Act Release No. 11111 dated November 20, 1974). On January 24, 1975, the S.E.C. suspended trading in International Business Machines Corporation and Telex Corporation from January 24, 1975 until 10:00 A.M. on January 28, 1975. (Exchange Act Release No. 11208 dated January 24, 1975). Furthermore, the S.E.C. has suspended trading in Continental Vending Machines Corp. for every successive ten day period from March 8, 1963 until the present. On the average, the S.E.C. has between 15 and 25 securities under trading suspension at any given point in time.

Clearly, then, this case does not meet the standards of mootness under *De Funis et al v. Odegaard et al* 416 U.S. 312 (1974). The S.E.C. has no intention of ceasing its allegedly illegal conduct and its claim of mootness is based on the technical ground that the particular orders of

suspension in question have since expired. In *De Funis, supra* that proceeding was dismissed as moot because the status of De Funis would not be affected by any view the court might express on the merits of the controversy. This is not the case here and there can be no question that dismissal on the grounds of mootness would be improper.

POINT II

THE S.E.C. ABUSED ITS DISCRETION IN ORDERING THAT TRADING IN CANADIAN JAVELIN LTD. BE SUSPENDED.

The excised memorandums on which the suspensions of trading in question purport to be based are filled with accusations of wrongdoing on the part of CJV and its officers. However, the author of these accusatory memorandums is protected by the cloak of anonymity. This is the result of a deliberate effort on the part of the S.E.C. to keep this court and anybody else who might read the record from knowing who wrote these memorandums. It should be noted that previously the petitioner moved that the full memorandums be filed as part of the record and the S.E.C. opposed this motion on the grounds that the full text of the memorandums including presumably the signature of the author was privileged. If that is the case, then the entire memorandums were priviledged, not just the part that the S.E.C. does not want this court to read. Accordingly, this court should not consider anything that is contained in these memorandums.

In any event, the memorandums appear to be based on the rankest kind of hearsay and would be inadmissible in a court of law. As a matter of fact, these memorandums are so-called "non-public" documents. In other words, prior to the time they were filed as part of this court proceeding, no person not employed by the S.E.C. could read them. This

was expressly provided for by S.E.C. Rule 122 (17 C.F.R. 230.122) and S.E.C. Rule 0.4 (17 C.F.R. 240.0-4). The effect of these rules can be seen from the *Appeal of the United States Securities & Exchange Commission* 226 F. 2d 501 (6th Cir. 1955).

The reason given by the S.E.C. for its initial suspension of trading of CJV was that it had filed a complaint in the district court and it wanted time for news of the allegations contained in that complaint to disseminate. (Exchange Act Release No. 10534 quoted above). Clearly, this was an abuse of discretion. It has been held that:

> "The statutes language granting the S.E.C. an injunction upon proper showing affords no sufficient basis for concluding that Congress meant special weight to be given the Commissions decision to allow its staff to institute suit."

S.E.C. v. Century Investment Transfer Co. C CH Fed. Sec. Law Rep. ¶93,232 (1971-72 transfer binder) quoting from *S.E.C. v. Frank* 338 F. 2d. 483 at 491 (2d. Cir., 1968). In this case, for example, the S.E.C. did not suspend trading when Sloan commenced his own suit against CJV even though this prior suit was based on many of the same allegations which were the subject of the complaint filed by the S.E.C. more than two months later. To be consistant, the S.E.C. should suspend trading whenever a suit is commenced against a public company.

There is another infirmity to the statement by the S.E.C. that time was required for the news of the filing of the complaint to disseminate to the public because the means by which the S.E.C. sought to disseminate this information to the public was the so-called "litigation release" which is routinely issued to the press by the S.E.C. whenever it commences suit. The publication of these litigation releases is a violation of the strictures set down by the American Bar Association. Therefore, the need for time to distribute the litigation release was unjustified.

In any event, it is apparent that the S.E.C. did not suspend trading in CJV for that reason. Had it done so, it would not have felt the need to suspend trading for as much as ten days. With the advent of modern technology, any news the press might see fit to disseminate would be published within a few days. Therefore, it is apparent that the S.E.C. was being untruthful in stating that it was suspending trading in order to allow time for the news to disseminate.

Furthermore, there was no need for the S.E.C. to suspend trading in CJV on November 29, 1973 because at that time trading had already been suspended by the American Stock Exchange. This fact was alleged by the S.E.C. in paragraph 15 of the complaint it filed on that date. Thus, there was no active trading market for CJV on November 29, 1973 even without the suspension of trading by the S.E.C.

The conduct of the S.E.C. in this instance is typical of its actions in other cases. The suspension of trading in American Telephone & Telegraph Co. was ordered pending an announcement concerning a suit brought by Department of Justice. (Exchange Act Release No. 11111). The suspension of trading of International Business Machines Corporation and Telex Corporation was ordered because of a decision made by the United States Court of Appeals which reversed a lower court ruling in *Telex Corp. v. International Business Machines. Corp.*, 510 F. 2d. 894 (1975). Presumably, according to the logic upon which these suspensions of trading were based, every time the Department of Justice files a complaint and every time the United States Court of Appeals hands down a decision which might potentially affect the financial affairs of a public company, the S.E.C. should suspend trading.

In other cases, the S.E.C. suspended trading in securities which were not being traded. For example, in Exchange Act Release No. 10732, the S.E.C. suspended

trading in all securities of 48 companies including Dumont Corporation of Fort Lee, N.J. However, the shares of this corporation have never been publically quoted or traded. Presumably this company had been filing 10-K reports on a voluntary basis without ever being quoted or traded and then became delinquent in its filings. It is submitted that this circumstance demonstrates that the S.E.C. has abused its discretion in suspending trading not only in this case but in numerous other cases.

Historically, the S.E.C. has shown great reluctance to use its authority to suspend trading. It first acquired this authority in 1934 but did not make use of it until 1944. As Loss stated in 1969:

> "As might be expected, the Commission first regarded summary suspension of trading as a highly extraordinary remedy, but over the years, though its use is still far from routine, has grown decreasingly hesitant to resort to it. After waiting ten years to enter the first order under section 19(a) 4 and then entering only 7 orders in the ten-year period 1944-53 (with none at all in 1949-52) and 10 orders in the five year period 1956-60, the Commission used this authority 10 times in the single year 1965, 13 times in 1966, 28 times in 1967, and 29 times in the first nine months of 1968." L. Loss, Securities Regulation, Volume V, p. 2816.

However, since that time, the use by the S.E.C. of its authority to suspend trading has become almost routine. The S.E.C. has shown a willingness to suspend trading on almost any pretext or, worse yet, on no pretext at all. In the instant case, only the initial Exchange Act Release announcing the suspension of trading in CJV gave any reason for the suspension. Thus, it would appear that the S.E.C. suspended trading in CJV on more than forty subsequent occasions for no reason at all. The S.E.C. has also promulgated rule 15c 2-11 (17 CFR 240.15c 2-11) which, in

effect, prohibits brokers from making markets in suspended securities after the suspension has been lifted unless specified financial information and other information concerning the issuer of the security is filed with the S.E.C. or with the National Quotation Bureau, Inc.

It is submitted that it is never in the public interest for trading to be suspended in a security. The instant case provides an example of this. According to the memorandums which the S.E.C. has made part of the record, CJV was being operated by a scoundrel, namely, one John C. Doyle. The first paragraph of this memorandum states that Mr. Doyle is a fugitive from justice having jumped bail after his conviction and sentencing (A7).[2] However, assuming this to be true and assuming that Mr. Doyle is indeed a bad person, a suspension of trading in the shares of CJV is hardly an appropriate remedy. The suspension causes needless injury to innocent persons, namely the stockholders of CJV, without any offsetting benefit. For this reason, a suspension of trading is not justified under any circumstances. (See *Brandwein v. American Stock Exchange* CCH Fed. Sec. Law Rep. ¶93,767 (S.D.N.Y. 1972-3 binder)). It is submitted that under the free enterprise system which the S.E.C. claims to have a commitment to uphold, any person should be permitted to buy and sell any security regardless of what view a federal regulatory body may take with respect to that security. Therefore, trading in CJV should not have been suspended.

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2. This accusation relates to *United States v. Doyle* 348 F. 2d. 715 (2d. Cir. 1965) *cert. denied* 382 U.S. 843 in which Mr. Doyle pleaded guilty to a violation of the Securities Act of 1933 and subsequently jumped bail.

POINT III

THE ORDERS OF SUSPENSION OF TRADING ARE A LEGAL NULLITY BECAUSE THEY ARE UNSIGNED BY ANY OF THE SECURITIES AND EXCHANGE COMMISSIONERS.

It appears that the commissioners themselves never sign anything. Instead all orders of the S.E.C. are either unsigned or else are signed by the secretary of the S.E.C. There is nothing in the Exchange Act which gives the S.E.C. commissioners the power to delegate their own quasi-judicial authority. Therefore, all of these unsigned orders are a legal nullity.

Undoubtedly, the S.E.C. will argue that the signing of an order is nothing more than a ministerial act. This is not the case. The signing of orders is perhaps the most important single function which the commissioners are empowered to perform. One can imagine the uproar which would occur if all of the judges of this court were to decide that their law clerks had the power to sign orders in their behalf.

In the instant case there is doubt that the commissioners participated in any way in many of the decisions to suspend trading in CJV. Meetings and deliberations by the commissioners are secret; so secret, in fact, that one can rightfully wonder whether the commissioners meet at all. In this case, trading has been suspended in CJV for successive ten day periods continuing for more than a year. Therefore, more than forty orders of suspension are involved. Only the most naive person would imagine that the commissioners decided among themselves every time trading was suspended in CJV. The case of Continental Vending Machines Corp. provides another example. In that case, trading has been suspended every ten days for

the past twelve years. Nobody could be expected to believe that the commissioners actually have made up their minds every time a new suspension of trading has been ordered.

Undoubtedly, the truth is that in most cases the commissioners play no functional part in the decision to order the suspension of trading. Rather, this decision is made by the staff of the S.E.C. without the commissioners even being consulted. Particularly in view of this circumstance, any unsigned orders should be declared a legal nullity.

As a matter of fact, an examination of the orders in question leads one to suspect that they were signed by two different persons although all purport to contain signatures of George A. Fitzsimmons. The signatures at A5, A45, and A48 do not in any way resemble the signatures to be found at A36, A39, A42, A51 and A54. It appears that what purports to be a signature at A5, A45 and A48 is a forgery. In view of the total disregard for the laws and constitution of the United States which the Securities & Exchange Commissioners have consistantly displayed, it seems hardly surprising that this is the case.

POINT IV

THE SECURITIES & EXCHANGE COMMISSION VIOLATED SECTIONS 15(c) 5 AND 19(a) 4 OF THE EXCHANGE ACT BY SUSPENDING TRADING FOR A PERIOD GREATER THAN TEN DAYS.

As noted previously, the S.E.C. initially suspended trading in CJV for ten days and then "continued" the suspension for successive ten day periods for more than a year. This procedure conforms to the general policy of the S.E.C. (See *In the Matter of Red Bank Oil Co.* 21 S.E.C. 695, '45-'47 C CH Dec. ¶75,610).

Sections 15(c) 5 and 19(a) 4 of the Exchange Act are

clear and explicit in providing that trading may not be suspended by the S.E.C. for a period of more than ten days. In Section 19(a) 4, the seriousness with which Congress regarded the severe remedy of a suspension of trading is demonstrated by the fact that Congress provided that trading may be suspended for a period not greater than 90 days only with the approval of the President. In this case the President has not given his approval.

Undoubtedly, the S.E.C. thinks it has found a so-called "loophole" in the law. However, it is clear that this loophole does not exist. If Congress had wanted to give the S.E.C. the power to suspend trading indefinitely it would have so provided by statute. This willingness by the S.E.C. to wink at the statute by which it is created should be considered in light of the severity with which the S.E.C. views the acts of those who dare to violate its own rules.

POINT V

SECTIONS 15(c) 5 AND 19(a) 4 OF THE EXCHANGE ACT, WHICH PROVIDE THAT THE S.E.C. IS AUTHORIZED SUMMARILY TO SUSPEND TRADING IN ANY SECURITY, ARE UNCONSTITUTIONAL.

It is submitted that it should be apparent that Sections 15(c) 5 and 19(a) 4 of the Exchange Act are unconstitutional in at least two respects. First, these sections run contrary to the right guaranteed by the Fifth Amendment that no person shall be deprived of liberty or property without due process of law. It is well established that due process means notice and the opportunity for a hearing. *Sugar v. Curtis Circulating Co.* 383 F. Supp. 643 (1974). Neither are present here. The statute provides that trading may be suspended "summarily." Clearly, Congress in-

tended that there would be neither notice nor an opportunity for a hearing. In addition, the concept of a suspension of trading violates Fifth Amendment property rights including the "right to contract" which is set forth in *Allgeyer v. Louisiana* 615 U.S. 578 (1897). Furthermore, the standard which the S.E.C. must apply in suspending trading in a security is unconstitutionally vague. In practice there is no standard at all. As a result, the statute in question must be unconstitutional.

The statute is also unconstitutional because the United States does not have the authority under the constitution to suspend trading in a security. Article I, Section 8, Clause 3 of the Constitution, the "commerce clause," gives the Congress the power to regulate commerce "among the several states." By no stretch of the imagination can the purchase and sale of securities of CJV be found necessarily to involve commerce among the several states. In addition, only the Congress and not the S.E.C. has the power to regulate commerce among the several states.

In *Paul v. Virginia* 75 U.S. 168, 183 (1868) the court held:

> "They [insurance policies] are like other personal contracts between parties which are completed by their signature and the transfer of consideration. Such contracts are not inter-state transactions, though the parties may be comiciled in different states."

In *re Greene*, 52 Fed. Rep. 104, 112 (1892) the court said:

> "But Congress certainly has not the power or authority under the commerce clause or any other provision of the Constitution, to limit and restrict the right of corporations created by the States, or the citizens of the States, in the acquisition, control or disposition of property."

In spite of the time which has elapsed since these decisions, the basic principles which they embody have not changed. Furthermore, there has never been a decision which granted Congress the right to delegate its own authority.

There have been instances in which a suspension or other summary action have been upheld but only where a hearing was available. *R.A. Holman & Co. v. S.E.C.* 299 F. 2d. 127 (1962); *Fahey v. Mallonee*, 332 U.S. 245 (1947). In *Ewing v. Mytinger & Casselberry, Inc.* 339 U.S. 594, 599 (1950) *rehearing denied* 340 U.S. 857 the Supreme Court stated:

> "It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination."

However, there is no possibility for a judicial determination here. It should be noted that neither the Exchange Act nor any rule or regulation of the S.E.C. provides for a hearing in connection with an order of suspension of trading. Furthermore, judicial determination necessarily requires a hearing before a judge in a court of law. Thus, even if the S.E.C. were to take the unprecedented step of ordering a hearing concerning the trading suspension of CJV at this late stage, such a hearing would not permit a judicial determination as is required by the Fifth Amendment to the Constitution.

POINT VI

THE EXISTANCE OF AN INDEPENDANT REGULATORY AGENCY SUCH AS THE SECURITIES AND EXCHANGE COMMISSION, WHICH IS NOT PART OF THE EXECUTIVE, LEGISLATIVE OR JUDICIAL BRANCHES OF THE UNITED STATES GOVERNMENT BUT WHICH POSSESSES THE COMBINED POWERS OF ALL THREE BRANCHES OF THE GOVERNMENT, IS REPUGNANT TO THE CONSTITUTION.

The S.E.C. and the Federal Reserve Board constitute what might be characterized as the fourth branch of the government. The commissioners are not answerable either to the president or to the Congress. In fact, the commissioners appear to maintain that they are not answerable even to the courts. In *Sloan v. S.E.C.* et al, 74 Civil 2792, which is now on appeal under U.S.C.A. docket number 75-7283, the S.E.C. maintained that it possesses a sovereign immunity from suit.[3] If this court does order that the order of suspension of trading in CJV be vacated, there is a question as to whether the S.E.C. might simply ignore this or any order of this court. It is submitted that this prospect demonstrates the unconstitutionality of an independent regulatory body.

The starting point must be that federalism is a con-

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3. In an amended complaint filed in that action, Sloan alleged that the S.E.C. had suspended trading in 28 securities in which he had previously been a market maker. In its answer, the S.E.C. admitted that it had suspended trading in those securities. Subsequently, the S.E.C. commenced an injunctive suit against Sloan, *S.E.C. v. Sloan* 74 Civil 5729, after Sloan had listed in the pink sheets published by the National Quotation Bureau, Inc. approximately 300 securities which had been suspended from trading by the S.E.C. during 1973 and 1974. The district court determination of both of these proceedings is now on appeal to this court.

stitutional concept. *Jennings v. Boenning & Co.* 482 F. 2d 1128 (3rd Cir. 1973).

> "The constitution of the United States—recognizes and preserves the autonomy and independance of the States." *Erie RR v Tompkins*, 304 U.S. 64 at 78 (1938) quoting from Mr. Justice Field in *Baltimore & Ohio RR v Baugh*, 149, U.S. 368, 401 (1893).

In this case, Congress has taken a right which had previously been reserved to the states and has vested it in an independant regulatory body. In fact, Congress has recently passed legislation which establishes an Environmental Protection Agency and a Consumer Product Safety Commission with powers similar to that of the S.E.C. The creation of these new agencies will necessarily lead to a totally regulated economy. If this trend is allowed to continue, the concept of federalism will soon become a dead letter.

As every high school student of history knows, the Constitution establishes the doctrine of "Separation of Powers." That doctrine was affirmed by *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803). One purpose of the doctrine of separation of powers is to prevent too much power from being in the hands of any division of the government. As James Madison stated in *The Federalist* No. 47:

> "The accumulation of all powers, legislative, executive and judiciary, in the same hands whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[4]

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4. . . . The Federalist Papers has been cited as a source of constitutional law by the Supreme Court of the United States and continues to be so regarded. As Chief Justice Marshall said in *Cohens v. Virginia* 19 U.S. (6 Wheat) 264 (1821):

> "Its intrinsic merit entitles it to this high rank [as a complete commentary on our constitution] and the part two of its authors

What the Congress has done here is to create a tyrannical and despotic government agency. This agency has the power to make laws (i.e. the S.E.C. rules and regulations), to enforce its own laws (by commencing and prosecuting administrative and judicial proceedings), and to sit in judgment as to whether its own laws have been violated (by entering orders of the S.E.C.). Recently, the S.E.C. has barred the petitioner for life from being associated with any broker or dealer (Exchange Act Release No. 11376 dated April 28, 1975, petition for review filed U.S.C.A. docket No. 75-4087) because he dared to challenge the validity and the constitutionality of various S.E.C. rules.

In its 40 years of existance, the S.E.C. has never sustained a serious legal setback primarily because of its ability to crush opposition mercilessly. It is hard to imagine an individual in the securities industry who does not live in constant fear of the S.E.C.

It is submitted that nowhere in the sparse language of the Constitution can one find room for the creation of an independant regulatory body. Article I, Section 1 states:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

Article II, Section 1 states:

> "The executive power shall be vested in a president of the United States of America."

Article III, Section 1 states:

> "The judicial power of the United States, shall

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performed in framing the constitution put it very much in their power to explain the views with which it was framed."

Incidently, it is noteworthy that James Madison, who in 1788 wrote the passage from the Federalist Papers quoted above, subsequently became the successful defendant in *Marbury v. Madison*, the 1803 case which is generally credited with affirming the doctrine of the separation of powers.

be vested in one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish."

It is submitted that it is clear that the establishment of an independent regulatory body such as the S.E.C. is precisely what the Constitution was designed to prevent.

POINT VII

THIS PROCEEDING, WHICH IS AUTHORIZED BY SECTION 25 OF THE EXCHANGE ACT, DEPRIVES THE PETITIONER OF HIS CONSTITUTIONAL RIGHTS IN THAT IT DOES NOT PROVIDE FOR JUDICIAL REVIEW OF ORDERS OF THE SECURITIES AND EXCHANGE COMMISSION AND IT DEPRIVES THE PETITIONER OF THE RIGHT TO A HEARING IN A COURT OF LAW.

In the past few years there has been a proliferation of statutes passed by Congress which provide for proceedings to be instituted in the Court of Appeals in the first instance. These proceedings consume a substantial portion of the time of this court.

Presently this Court has the statutory power to review orders of the Securities & Exchange Commission, the Federal Communications Commission, the Federal Power Commission, the Federal Trade Commission, the Environmental Protection Agency, the Occupational Safety and Health Review Commission, the Benefits Review Board, the Department of Labor, the Federal Reserve Board, the Department of Agriculture, the Commissioner of the Internal Revenue Service, the Federal Reserve Board, the National Labor Relations Board, the Civil Aeronautics Board, the Federal Maritime Board, the

Immigration and Naturalization Service, the Interstate Commerce Commission, and the Consumer Product Safety Commission. It is submitted that the time has come for this Court to go back to the business of deciding appeals involving litigation.

This Court is, by definition, an appellate court. As a result, it can only hear appeals. A petition for review from an order of an administrative agency is not an appeal. In *Marbury v. Madison, supra* it was established that an appellate court has the power to declare unconstitutional the statute upon which a proceeding is filed in that court. It is submitted that on this basis, this court should declare the Exchange Act to be unconstitutional.

Marbury v. Madison was concerned with a petition for a writ of mandamus which was filed directly in the Supreme Court of the United States. Although the petition was authorized by an act of Congress, namely the Judiciary Act of 1789, the Supreme Court dismissed for lack of jurisdiction. The Supreme Court decided that under Article III, Section 2 of the Constitution, Supreme Court jurisdiction over such matters begins at the appellate level and that therefore the act of Congress which authorized the filing of a petition for a writ of mandamus directly in the Supreme Court was unconstitutional.

It is submitted that this court should arrive at the same result and declare the Exchange Act to be unconstitutional. In essence, the Exchange Act creates a regulatory body which has broad rule making authority and which has two avenues by which it may enforce its rules. One of these avenues is the power to institute injunctive proceedings which is provided for by Section 21(e) of the Exchange Act. It is submitted, however, that this is an improper delegation of authority and, under the constitution, lawsuits may be commenced only by the office of the United States attorney and only in cases where the United States of America has sustained or is in danger of

sustaining injury. Under the constitution, the United States of America is totally unconcerned with "protecting the public." The power to prosecute actions for the purpose of protecting the public is and, under the constitution, should be reserved to the states.

The second avenue by which the S.E.C. may enforce its own rules is the power to make orders and to enforce them through the courts as provided for by Section 21(f) of the Exchange Act. However, the S.E.C. rarely has the need to resort to Section 21(f) of the Exchange Act. In the case at the bar, a single telephone call was sufficient to enforce compliance with the orders of the S.E.C. suspending trading in CJV. That telephone call was to the American Stock Exchange which immediately halted trading in CJV. Therefore, it immediately became impossible for anyone to act in contravention the order of the S.E.C. In addition, the S.E.C. enforced compliance with its order by issuing releases to the press. These releases were published in the Federal Register and were summarized in the "S.E.C. News Digest" which is distributed widely on a subscription basis. The news of the administrative orders, which is published in the "S.E.C. News Digest," is invariably reported in the Wall Street Journal the next day.

In papers filed in another proceeding, the S.E.C. has suggested that if the argument advanced by the petitioner is correct the result will be the elimination of the only avenue by which one can obtain review of orders of the S.E.C. The S.E.C. has urged that even if Section 25 is unconstitutional, the S.E.C. would still have the power to make orders. It is submitted that this is not the case. Clearly, Congress did not intend to create an agency which would have the power to make orders which would be beyond review by the courts. If Section 25 is unconstitutional then, of necessity, Sections 15 and 19, which give the S.E.C. the authority to make orders, are both unconstitutional.

It must be found that Section 25 is unconstitutional. For this section to be constitutional, this Court would be forced to arrive at the conclusion that the S.E.C. is a court of law. Under Article III, Section 1 of the constitution this court may only hear appeals from courts of law. It is noteworthy that the S.E.C. does appear to sit as a court of law and in Exchange Act Release No. 11376, in which it revoked the broker dealer registration of the petitioner, it stated the following:

> "Nevertheless, we think it appropriate to note that respondents [Sloan's] constitutional contentions are nothing less than an attack on all federal administrative law since they assume that Congress cannot vest this and other federal agencies with quasi-legislative and quasi-judicial powers, and that respondent cites nothing (other than his own ideas about the Constitution) in support of this radical position. We also note that the Supreme Court seems to take a different view. See *Butz v. Glover* 411 U.S. 182 (1973) where the court cited with approval *Hiller v. S.E.C.*, 429, F. 2d. 856, 858-859 (2d Cir., 1970) and *Dlugash v. S.E.C.* 373 F. 2d 107, 110 (2d. Cir. 1967), 411 U.S. at 187."

Although this is not the only constitutional argument advanced by Sloan, it correctly states his position on this point. To begin with, this view may indeed be radical in the opinion of the S.E.C., but it nevertheless conforms to the ideas of such well known radicals and revolutionaries as George Washington, James Madison and Alexander Hamilton all of whom were signers of the Constitution. Although the concept that the power of the state should be subverted to the right of freedom of the individual has always been and continues to be "radical" concept, it is this concept upon which the constitution of this nation, for better or for worse, is based. In the case at the bar, Section

25 is unconstitutional because this court must attempt to review a proceeding in which there has been no trial or a hearing on the merits by a lower court. This court is ill equipped to make findings of fact even in cases involving appeals from the district courts. If the S.E.C. had conducted a hearing, which it did not do in this case, it would be permitted, under the Administrative Procedure Act, 5 U.S.C. 551 et seq., to receive evidence which would be inadmissible in a court of law. Again, this prevents this court from providing the administrative equivalent of adequate and effective appellate review. Furthermore, this court cannot exercise over the S.E.C. the type of supervisory jurisdiction which it exercises over district court judges. In appeals from the district court, this court can, for example, order that a case be assigned to a new judge or it can remand with instructions to dismiss the complaint. In this case, it can do neither of these things. Under Section 25, it can only affirm, modify, enforce, or set aside the order of the S.E.C. However, contrary to the language of Section 25, this court has no power to enforce either its own orders or orders of the S.E.C. It is entirely possible that the S.E.C. might simply choose to ignore whatever order might be entered by this court. That prospect was present in the *United States v. Nixon* ——U.S.——, 41 L. Ed. 2d 1039 (1974) where the now former president of the United States advanced arguments similar to those which the S.E.C. will undoubtedly advance in this case.

On the question of jurisdiction, which is one of the questions involved in this appeal, the petitioner is forced to take the position that this court has no jurisdiction because Section 25 is unconstitutional. This is somewhat the converse of the usual argument because normally the petitioner can be expected to argue that this court does have jurisdiction and the respondent can be expected to argue that this court does not have jurisdiction. However, in order to be consistant with the position it has taken in

Sloan v. S.E.C. et al. 74 Civil 2792, and in *S.E.C. v. Canadian Javelin Ltd. et al* 73 Civil 5074, the S.E.C. must argue that this court has exclusive jurisdiction to review orders of suspension of trading. Thus, there is an actual controversy as required by Article III, Section 2 of the Constitution.

POINT VIII

THE PETITIONER IS ENTITLED TO THE RECOVERY OF COSTS BECAUSE SECTION 27 OF THE EXCHANGE ACT, WHICH PROVIDES THAT NO COSTS MAY BE ASSESSED FOR OR AGAINST THE S.E.C. IS UNCONSTITUTIONAL.

The S.E.C. is unique among litigants. It is not required to pay a docket or a filing fee if it wants to institute a proceeding either in this court or in the district court. If it does not prevail, it is exempt from the general rule that costs be awarded in favor of the prevailing side. Even the United States of America, if it loses, is required to pay costs such as the docket fee and other fees necessarily incurred during the course of litigation. The S.E.C. is exempt from the payment of costs by virtue of Section 27 of the Exchange Act. It is submitted that this section is unconstitutional because it deprives the prevailing party of the equal protection of the law[5] and it deprives him of property without due process of law.

If the S.E.C. loses in the court below and appeals to this court, it is not required to pay a $50 docket fee. However, if

5. Although the equal protection clause of the Fourteenth Amendment applies only to state action, there is nevertheless a constitutionally valid equal protection aspect to the Fifth Amendment. *Jackson v. Statler Foundation* 496 F. 2d 623 (2d Cir. 1974). In any event, all persons are entitled to the equal protection of the law. *United States v. Price* 383 U.S. 787 (1966); *Bolling v. Sharpe* 347 U.S. 497 (1954).

the S.E.C. prevails and the opposing side wishes to appeal, he must pay a $50 docket fee plus $5 to file a notice of appeal in the district court. Because of this unequal situation, the S.E.C. has an inherent advantage in all court proceedings. Furthermore, the fact that a party cannot recover costs even if he is successful in an attempt to overturn an order of the S.E.C. undoubtedly discourages many litigants who justifiably feel aggrieved by an order of the S.E.C. and who would otherwise institute a proceeding in this court. It may be observed that while the S.E.C. issues administrative orders every day, review of these orders is sought in this or in other appellate courts on a relatively infrequent basis.

It is submitted that Section 27 deprives the petitioner, if he prevails, of the equal protection of the law and, in addition, deprives him of property without due process of law. In this case, the petitioner was required to pay a $50 docket fee in order to institute this proceeding. If he wins, the petitioner is entitled to get his money back. Any other result would deprive him of property without due process of law. Conversely, if he loses, the petitioner should be required to pay costs to the S.E.C. provided, of course, that this court declares Section 27 to be unconstitutional.

Parenthetically, it should be noted that Section 27 is unconstitutional in several other respects which have no bearing on the circumstances of this case. Section 27 gives the district courts of the United States "exclusive jurisdiction" over all actions brought to enforce violations of this title. In doing so, this section deprives the state courts of their jurisdiction by unconstitutional means. In addition, Section 27 provides for nationwide service of process. *Mariash v. Morrell* 496 F. 2d 1138 (2d Cir. 1974). Again this is unconstitutional under the concept of federalism. Since Section 27 is unconstitutional the petitioner is entitled to the recovery of costs.

POINT IX

SINCE SECTIONS 15(c) 5, 19(a) 4, AND 27 OF THE EXCHANGE ACT ARE UNCONSTITUTIONAL, THE ENTIRE ACT IS UNCONSTITUTIONAL.

The Exchange Act must be viewed as an integral whole, not as the sum of its parts. If certain key sections of the Exchange Act were declared unconstitutional and the remainder were allowed to stand, the result would be a statute which would be far removed from what Congress intended. It is submitted that if any one section of the Exchange Act is unconstitutional then the entire act is unconstitutional.

In fact, this point could probably go unstated were it not for the language of Section 33 of the Exchange Act (15 U.S.C. 78gg). Section 33 has the effect of prohibiting the courts from declaring any sections of the Exchange Act to be unconstitutional. It is submitted, however, that section 33 of the act is itself unconstitutional for a number of self-evident reasons. Among other things, it provides for a deprivation of the equal protection of the law. This section states that if any section of the Exchange Act is found to be invalid as to any person or circumstances, its validity as to other persons or other circumstances shall not be affected thereby. Clearly, this is unconstitutional. If a law applies to one person, it shall apply to all persons. If a law does not apply to one person, it does not apply to any persons. Therefore, this section is unconstitutional and the entire Exchange Act is unconstitutional.

CONCLUSION

For all of the reasons set forth above, the orders of suspension of trading of Canadian Javelin Ltd. should be vacated and the Securities Exchange Act of 1934 should be declared unconstitutional.

Respectfully submitted,

s/Samuel H. Sloan
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Dated: Lynchburg, Virginia
May 27, 1975

Appendix

APPENDIX

RELEVANT FEDERAL STATUTORY PROVISION

SECURITIES EXCHANGE ACT OF 1934:

Section 15(c) 5 (U.S.C. 78o(c) 5):

If in its opinion the public interest and the protection of investors so require, the Commission is authorized summarily to suspend trading, otherwise than on a national securities exchange, in any security (other than an exempted security) for a period not exceeding ten days. No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in which trading is so suspended. [As added by Act of August 20, 1964, Sec. 6(c), 78 Stat. 573.]

Section 19(a) (15 U.S.C. 78s(a)) states in part:

The Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors —

(4) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days.

Section 21(e) (15 U.S.C. 78u(e)):

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States, the district court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or

temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title. [As amended by Act of June 25, 1936, 49 State. 1921.]

Section 21(f) (15 U.S.C. 78u(f)):

Upon application of the Commission the district courts of the United States, the district court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States, shall also have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this title or any order of the Commission made in pursuance thereof or with any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title. [As amended by Act of May 27, 1936, 49 Stat. 1379; Act of June 25, 1936, 49 Stat. 1921.]

Section 25 (15 U.S.C. 78y):

Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, and enforce or set aside such order, in whole or in part. No

objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C. title 28, secs. 346 and 347). [Note. — Sections 346 and 347 of Title 28 of the U.S. Code were repealed by the Act of June 25, 1948, Sec. 39, Public Law 773, 80th Congress, effective September 1, 1948. Provisions similar to those contained in Sections 346 and 347 are now contained in Section 1254 of Title 28 of the U.S. Code. See 60,302. CCH.] [As amended by Act of June 7, 1934, 48 Stat. 926; Act of June 25, 1948, 62 Stat. 991, as amended by Act of May 24, 1949, 63 Stat. 107; Act of August 28, 1958, 72 Stat. 945.]

Section 27 (15 U.S.C. 78aa):

The district courts of the United States, the district court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive

jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). [Note. — Sections 225 and 347 of Title 28 of the U.S. Code were repealed by the Act of June 25, 1948, Sec. 39, Public Law 773, 80th Congress, effective September 1, 1948. Provisions similar to those contained in Sections 225 and 347 are now contained respectively, in Sections 1254 and 1291-1294 of Title 28 of the U.S. Code. See 60, 302-60, 314. CCH.] No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

Section 33 (15 U.S.C. 78gg):

If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Sloan v. SEC 74 2457

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 4 day of June, 1974 deponent served the within Brief upon Thomas L. Taylor III Diamond + Taloma

attorney(s) for Appellee

in this action, at 500 N. Capitol St. - 99 Park Ave Washington, DC. 20549 N Y C.

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
4 day of June, 1974

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976